IN THE SUPREME COURT OF MISSOURI

No. SC86022

SCANWELL FREIGHT EXPRESS STL, INC.,

Respondent

v.

STEVIE CHAN and DIMERCO EXPRESS (U.S.A.) CORP.,

Appellants

On Appeal From The Circuit Court For The Twenty-First Judicial Circuit
St. Louis County, Missouri
Division 5
Honorable John F. Kintz

APPELLANTS' SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

ARGUMENT

I.

The Trial Court Erred In Denying Appellants' Motion For Judgment Notwithstanding The Verdict Because Respondent Failed To Make A Submissible Case In That It Failed To Present Any Evidence From Which The Jury Could Reasonably Find That Chan Owed A Fiduciary Duty Concerning The Lease Or That She Breached Any Such Duty, Inasmuch As An At-Will Employee's Mere Preparation To Leave Her Employment, Including Entering Into A Lease Of Office Space, Is Insufficient To Show A Breach Of Fiduciary Duty.

Respondent Scanwell Freight Express STL, Inc. contends that the duty of loyalty that an employee owes to her employer is identical to the duty of loyalty that a true fiduciary, such as a trustee, owes to a beneficiary. That position cannot be reconciled with the decision of *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1 (Mo. banc 1966) — an effort that Scanwell doesn't even try to make.

An employee's duty of loyalty to her employer is not the same as a trustee's duty of loyalty to a beneficiary. While still employed, an employee can make plans and preparations for starting or joining a competing business, obtain a lease for the competing business, speak to other employees who are dissatisfied at work about joining the new business, obtain equipment and supplies for the new venture, do all of this secretly, and use the knowledge, skills and contacts acquired while working for her current employer in the new competing business. *See id*. at 27, 36-37, 41. The employee can do all of these things and never run afoul of the duty of loyalty she owes to her current employer.

A trustee, on the other hand, has no such freedom. The duty of loyalty a trustee owes to a beneficiary is "more intense than in any other fiduciary relationship." *See Smith v. First National Bank of Danville*, 254 Ill.App.3d 251, 261, 624 N.E.2d 899, 907 (4th Dist. 1994). The trustee's duty of loyalty is stronger because the trustee has such great control over the trust property that is to be used for the beneficiary, thus "warranting a higher standard than would be imposed in the case of an ordinary business relationship." *Id*.

Where the trust property is a business, the trustee cannot do anything that would be considered substantial competition with the interests of the beneficiary. In *Grynberg v. Watt*, 717 F.2d 1316 (10th Cir. 1983), for example, the trustees submitted their own bids for a lease of government land, as well as a bid on behalf of the trust. The court held that making any bid, especially a successful one, would have been a violation of their duty of loyalty because a trustee cannot place himself in a position in which his self interest will or *may* conflict with his duties as trustee. *See id*. at 1319. *See also Sauvage v. Galloway*, 329 Ill.App. 38, 44, 66 N.E.2d 740, 743 (4th Dist. 1946)(trustee must act "honestly and with finest and undivided loyalty to his trust, not merely with the standard of honor of the workaday world, but with a punctilio of honor the most sensitive."); 2 A. Scott, THE LAW OF TRUSTS § 170.23 (Fratcher 4th ed. 1987)(trustee may not carry on competing business); G. Bogert, TRUSTS § 95 at 347 (6th Ed. 1987)(same).

If an employee had a duty of loyalty to her employer like that of a trustee to a beneficiary, then she could do none of the things *Trieman* says she can do. Scanwell doesn't try to resolve the issue. Rather, it just picks the words and phrases "fiduciary" or "duty of loyalty" out of a list of cases without providing any analysis of the particular

factual situations involved or how the courts resolved the apparent contradictions between a so-called "fiduciary duty" and the employee's conduct that didn't violate it.

Appellants believe that the question of Stevie Chan's conduct is best analyzed as an application of the duty of loyalty — meaning the employee cannot actively compete with her employer while still working there. *See* Appellant's Brief at 34-35, 36-37. Nothing in the cases listed by Scanwell is inconsistent with the duty of loyalty as defined above.

Space considerations for a reply brief prevent us from examining each case cited by Scanwell in detail. They do, however, fall into three categories:

- The employee takes trade secrets or confidential documents with her to the new employer — *National Rejectors, Inc. v. Trieman*, 409 S.W.2d (Mo. banc 1966)*; Arnold's Ice Cream Co. v. Carlson*, 330 F.Supp. 1185 (E.D.N.Y. 1971); *Huey T. Littleton Claims Service, Inc. v. McGuffee*, 497 So.2d 790 (La. App. 1986); and *Tinsley v. Mavala, Inc.*, 226 F.Supp. 477 (S.D.N.Y. 1964)(which, incidentally, was a suit against the company's former chief executive officer, a fiduciary by operation of law).
- The employee solicits employees to leave while still employed at her current employer — *Republic Systems & Programming, Inc. v. Computer Assistance, Inc.*, 322 F.Supp. 619 (D. Conn. 1970).
- The employee solicits existing customers for the new business while still employed at her current employer — *Huey T. Littleton Claims Service, Inc. v. McGuffee*, 497 So.2d 790 (La. App. 1986); *Republic Systems & Programming, Inc. v. Computer Assistance, Inc.*, 322 F.Supp. 619 (D. Conn.

1970); *Futch v. McAllister Towing*, 518 S.E.2d 591 (S.C. 1999); *Graphics Directions, Inc. v. Bush*, 862 P.2d 1020 (Colo. App. 1993); *Hilb, Rogal & Hamilton Co. v. DePew*, 440 S.E.2d 918 (Va. 1994).

Scanwell professes not to understand whether Chan is challenging the adequacy of the factual basis for the claim against her. Resp. Br. at 25. Chan showed that there was no legal basis for a breach of fiduciary duty because at best she owed an employee's duty of loyalty. In her substitute opening brief, she also demonstrated that the evidence failed to support a claim under a theory of breach of fiduciary duty *or* breach of the duty of loyalty by a detailed exposition of the evidence. *See* App. Br. at 35-44.

Instead of pointing this Court to the evidence to support its claims, Scanwell substitutes conclusions for facts without any citations to the record. *See* Rule 84.04(i)(requiring specific page references to record when reciting statements of fact.)[1] Most of the factual claims made by Scanwell in its Brief at page 25 were discussed in detail in Appellants' Opening Brief. *See* App. Br. at 35-44. Scanwell cited no evidence to this Court that Chan breached her duty of loyalty while working for Scanwell because there was no such evidence. There was no evidence that Chan disclosed confidential

[1] Scanwell's Statement of Facts isn't much better. Although it claimed that Appellants didn't provide a proper statement, it nowhere identified any specific deficiency. Scanwell's own Statement of Facts added nothing, except to refer broadly to the record and to add pejoratives about "secret negotiations" to "take over" Scanwell's office. *See, e.g.* Resp. Br. at 10.

information to Dimerco while working for Scanwell, or that she solicited any employees or customers for Dimerco while employed at Scanwell.

There was no evidence that Chan took any confidential documents with her when she left. The only evidence was that she turned over everything, including computer files that had the customer SOP's, to Scanwell. T. 767-770, 1188. Scanwell's claim with respect to disclosure of confidential matters centers on two events: a five-minute "tour" of the Scanwell St. Louis office and giving Dimerco a copy of the InterGlobal SOP. *See* Resp. Br. at 25.

There was no evidence that Chan showed the Dimerco employees any confidential information during the tour. T. 327-328. The physical appearance of the office was hardly a confidential matter. And indeed, the evidence was undisputed that the location of the office was irrelevant to the conduct of the business. T. 381, 382. This was a freight-forwarding business that relied on telephone, facsimile transmissions, telex, and electronic mail for communications with customers. T. 381. It wasn't a fast-food operation dependent for success on "location, location, location."

While the disclosure of confidential information may be a breach of the duty of loyalty, the employer has the burden of proving that the information was confidential. *Trieman*, 409 S.W.2d at 18-20. Here, there was no such proof. The information in the SOP was readily available to anyone to compile from publicly available sources. InterGlobal's telephone number, for example, wasn't a secret. More importantly, the information was not actually kept a secret. InterGlobal itself had a copy of its own SOP and shared it with Scanwell's competitors as a method of securing better terms. There

was no evidence that Scanwell took any steps to make sure that its customers didn't get their own SOP and, if they did, that the customers wouldn't show it to the competition. Lacking such evidence, the SOP couldn't be considered confidential to begin with, and so Chan couldn't be faulted for showing Dimerco a copy.[2]

There was no evidence to support a claim that Chan solicited any Scanwell employees to join Dimerco while she was still employed at Scanwell or that she even told them of her plans to leave Scanwell and join Dimerco. (Even if there was such evidence, under *Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d 742 (Mo. App. E.D. 1993), it was proper to do so.) The only exception was that Chan mentioned her plans to her sister and boyfriend, both of whom worked with her in the Scanwell St. Louis office. T. 780. Even Scanwell conceded at trial that Chan did nothing wrong in telling persons close to her of her intentions and asking them to come with her. T. 1264-1265.

As for the other employees, Chan testified that she did not ask them to join her at Dimerco until after they received a letter from Scanwell stating that they were all being laid off. Ex. 28; T. 781. There was no contrary evidence from any of the former Scanwell employees or any other source. Scanwell's only counter to this void in its evidence was the claim that the letter was sent by an assistant without the boss' authorization. Resp.

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[2] The court should note that the jury found in favor of Chan on Scanwell's unfair competition claim in Count III. The jury obviously did not believe that Chan wrongfully disclosed Scanwell's confidential information to Dimerco.

Br. at 13. Scanwell hints that the employees somehow persuaded the assistant to provide the letters as part of a nefarious scheme, but there is no evidence for that either.

Even if the layoff letter was not authorized, how were Chan and the St. Louis employees supposed to know that? Scanwell never tried to revoke the letter. Thus, the employees were free to look for other work and Chan was certainly free to ask them to work for Dimerco. Moreover, asking these at-will employers to join her new company after Chan left on March 15 would be proper even if Chan had signed a written agreement not to do so. *Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 351 (Mo. App., E.D. 2000).

Despite Scanwell's claim,[3] repeated in the Argument without citation to the record, there was no evidence that Chan solicited Scanwell customers for Dimerco before she left or even told them she would be working for Dimerco. There were two sources of evidence on this issue — Chan's own testimony and that of the customers themselves. Chan said that she visited Rae Kathrens at Promotional Resources because she always goes there for the Chinese New Year and it was a regular trip to service a customer's needs. T. 613, 614. (Incidentally, Chan made the trip to that area for other reasons as well, specifically because another customer, Butler International, asked her to come. Ex. 64; T. 612.) Chan told Kathrens that she was leaving Scanwell but assured her that others

[3] Scanwell baldly misstates the evidence, claiming that "Chan . . . solicited customers for business . . . before announcing her resignation." Br. at 27.

at Scanwell would continue to service the account. Chan did not tell her that she was going to work for Dimerco. T. 612.

Kathrens confirmed Chan's testimony in every respect. She said that Chan told her only that she was leaving Scanwell. T. 1571-1572. Chan called Kathrens about Dimerco only after she had left Scanwell. T. 1575. To the extent that Scanwell's claim was based upon Kathrens' decision to switch to Dimerco later, the only evidence of the reasons for the switch came from Kathrens who complained about Scanwell's poor service. T. 1576-1579.

Scanwell cites no evidence to the contrary because there was none. Its claim that Chan's conduct was improper in this respect is without any factual or legal foundation. In contrast, the evidence here was that Chan assured Scanwell's customers that another Scanwell employee would be handling the account. Chan did exactly what the court in *Dwyer, Costello & Knox, P.C. v. Diak* said an employee could do — advise the customer that she was leaving. *See id*. at 748.

Scanwell cites *Kantel Communications, Inc. v. Casey*, 865 S.W.2d 685 (Mo. App., W.D. 1993) for the proposition that Chan's conduct violated a duty of loyalty to the employer. Resp. Br. at 28. (Note that the issue in *Kantel* was the duty of loyalty, *see id*. at 692, not a fiduciary duty comparable to that owed by a trustee to a beneficiary — a legal principle entirely consistent with that espoused by Appellants here.) In *Kantel*, in sharp contrast to the evidence here, the employee while still working for Kantel convinced the customer that Kantel couldn't fulfill the contract and signed the customers to a contract for the other company. *See id*. at 692-693.

The major point of contention remains the issue of the lease. There is little to add to what has already been said except a few parting observations. First, there is no evidence at all (as Scanwell insinuates) that Chan and the landlord, James West, "arranged for early termination of the lease" in 2001 as part of a plan "to take over that space." *See* Resp. Br. at 25. The only evidence on the issue came from Chan and West, both of whom testified that the lease was amended in 1998 shortly after it was originally entered — long before Chan even thought about leaving Scanwell. T. 336, 1493, 1540-1542.

Second, if the lease had not been amended to change the start date, the date for exercise of the option to renew would have been January 31, 2001. Although Chan had made her decision to leave a couple of days earlier (T. 489, 750), she did not tell Hassan or anyone else at Scanwell until February 20. If Scanwell wanted to exercise the lease option even as it originally was written, it should have made that known to West *before* January 31. Instead, by letting the renewal option expire after January 31, even without any knowledge Chan was leaving the company, the space was up for grabs by anyone who wanted it, regardless of whether the lease option date had changed. West could have leased the space to anyone and Scanwell couldn't have prevented it.

Scanwell seems to base its claim with respect to the lease on the grounds that Chan supposedly had "full authority" to negotiate the lease and with that a legal duty to "remind" her superiors in the Chicago office that the lease would expire. If anything is clear from the evidence, it is that Chan was not authorized to negotiate the lease on her own. She scouted out the property for Scanwell, received the terms from West and sent them to Chicago for approval. T. 535-537, 684, 1490. The fact that Hassan approved the

lease and "always" approved every request Chan made means nothing — the critical fact is that she had to seek his approval, a fact upon which both Chan and Hassan agreed. T. 445, 1100, 1245.

As for the failure to "remind" Scanwell of the renewal option, Resp. Br. at 12, Chan testified that she *did* tell Patrick Siu and Lorraine Ko that the lease expired at the end of March 2001. T. 540. She didn't talk to Hassan because he was out of the country. T. 540. Neither Siu nor Ko testified at trial (part of Ko's deposition was read at trial but not on this issue), and Chan's testimony stands uncontradicted.

Even apart from that undisputed fact, there is no "duty to remind," as Appellants have already pointed out. App. Br. at 39. Although invited to cite some case that supports such a position, Scanwell has not. The absence of such a duty, especially in this context, is no surprise. Chan followed her instructions by sending the lease to Chicago for legal review and approval by her superiors of the financial and other terms. T. 537. It wasn't part of her job to make the final decision. She didn't have "broad" authority to bind Scanwell to a lease, either originally or by an option to renew. T. 535, 1100, 1245. Scanwell lost the option to renew because Chan's superiors in Chicago dropped the ball, either mistakenly or deliberately, by failing to exercise it. Scanwell's failure to renew the lease was entirely consistent with Chan's belief that Scanwell intended to close the St. Louis office anyway.

Once that option was lost, the space was available for whoever wanted to make the right deal. Even if Chan had never left Scanwell, the company had no legal right to compel the landlord to renew the lease. Because Scanwell lacked any legal right to the

space, no one — certainly not Chan or Dimerco — could be held liable for a "takeover" of the lease.

The only theory on which the jury ruled in favor of Scanwell — an alleged breach of a fiduciary duty or a fiduciary duty of loyalty — was legally and factually without merit. An employee who is not a corporate officer and who has not contracted otherwise owes no fiduciary duty to her employer. She cannot compete with her employer while still working there, but she can certainly make preparations to do so. That is all that Chan did. There was no evidence to support any claim against her. And if the claim against Chan fails, so does the one against Dimerco because it was entirely derivative. The judgment against both defendants should be reversed.

II.

The Trial Court Erred In Denying Appellants' Motion For Judgment Notwithstanding The Verdict On The Issue Of Damages Because Respondent Failed To Present Any Evidence Of Damages Caused By The Alleged Misappropriation Of Its Office Lease, Inasmuch As The Only Damage Evidence Respondent Offered Was For The "Diminution In Value" Of The St. Louis Office Allegedly Caused By An Aggregate Of Purported Offenses, Rather Than Increased Rent Or Other Losses Caused Specifically By The Alleged Misappropriation Of The St. Louis Office Lease.

Scanwell says that there was substantial evidence to support the damages awarded, even though none of its damage evidence had any causal connection with the alleged breaches of fiduciary duty submitted to the jury. The instructions only mention two things, the lease and confidential information (although they improperly invited the jury

to award damages for anything the jury thought Chan and Dimerco did wrong — *see* Point V.) L.F. 70.

Scanwell suggests that the measure of damages is the value of the business as if Dimerco had bought it because Dimerco "took over" the St. Louis office. This makes no sense. Dimerco did not "take over" the office in the same way as a company acquiring another company would do. Scanwell had no legal right to the office space because it failed to exercise its option at any time. Dimerco didn't enter into the lease until February, *after* the option expired under both the original and amended terms of the lease. Therefore, it could not have been damaged by Dimerco entering into a lease of the Scanwell space because Scanwell would have had to leave if any new tenant had signed the lease. Scanwell made no attempt to value the lease it "lost." Indeed, the evidence showed that there still was other space available in the same building long after Scanwell decided to pull out of St. Louis. T. 1501, 1504, 1539.

Scanwell had no legal right to its customers either. There was no allegation or proof that Dimerco tortiously interfered with Scanwell's contracts. The customers had a right to leave Scanwell and go to Dimerco or any other freight forwarder at any time for any reason. Even if such a right had been claimed, Scanwell didn't present any evidence of damages specifically keyed to losing, for example, Promotional Resources (who left Scanwell because of poor service, T. 1576-1579) or from the disclosure of InterGlobal's SOP.

Scanwell implies that the "take over" of its office was comparable to a conversion claim, where the plaintiff is entitled to the fair market value of the property converted.

But that analogy doesn't work here because its "St. Louis office" isn't the type of property that can be converted. *See e.g. Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d at 747 (no property right in customers); *Schaefer v. Spence*, 813 S.W.2d 92, 96-97 (Mo. App. S.D. 1991)(ideas cannot be subject of conversion action); *Emerick v. Mutual Benefit Life Ins. Co.*, 756 S.W.2d 513, 523 (Mo. banc 1988)(suggesting but not deciding that lease can't be subject of conversion action).

Equally important, the evidence showed that Scanwell laid off its employees and made its own decision to close the St. Louis office after Chan left. There was no evidence that Scanwell lost St. Louis customers after Chan left because of any wrongful conduct by Chan or Dimerco.

There was no evidence of actual damages that related to the claims submitted to the jury. The judgment should be reversed outright, or at the very least remanded for a new trial.

III.

The Trial Court Erred In Denying Dimerco's Motion For Remittitur Or, Motion For New Trial On The Issue Of Damages Because The $254,000 Verdict Against Dimerco Was Inconsistent With The $54,000 Verdict Against Chan And Was Not Reasonably Calculated To Fairly Compensate Respondent But, Rather, Was Designed To Punish Dimerco In That Even Though Dimerco Was Held Liable As A Co-Conspirator, And Even Though The Damages Resulting From A Conspiracy Cannot Exceed The Damages Resulting From The Underlying Alleged Tort, The Verdict Against Dimerco Exceeded By $200,000 The Amount Of Damages The Jury Arguably Concluded Respondent Suffered As A Result Of The Underlying Alleged Tort.

The issue with respect to Appellants' third point is whether a co-conspirator can be held liable for more damages than those attributable to the conduct of the underlying tortfeasor with whom the party allegedly conspired. The answer is clearly "No" because of the nature of conspiratorial liability. A civil conspiracy is not a free-standing tort; it is a means of imposing vicarious liability on one co-conspirator for the damages caused by the actions of the other that constitute the underlying tort. In other words, Dimerco's liability depends on the existence of a wrongful act committed by Chan. If such a wrongful act is committed, then Dimerco is liable jointly and severally for the *same* damages that Chan is liable for. *Mills v. Murray,* 472 S.W.2d 6, 14 (Mo. App. 1971).

Scanwell contends, however, that the jury can "apportion" the damages between co-conspirators. Thus, the argument goes, an award of $54,000 against Chan and $254,000 against Dimerco was simply an apportionment of damages of $308,000 between the two

defendants based on some perception of relative fault (an issue that was never submitted to the jury). In making this argument Scanwell relies on *Haynes v. Hawkeye Security Ins. Co.*, 579 S.W.2d 693 (Mo. App., W.D. 1979). That case is irrelevant to the issue.

In *Haynes*, four persons injured in an automobile accident sued the other driver and his insurance company, alleging that they conspired to make it impossible for the injured persons to collect on their judgments against the driver. Each of the plaintiffs had recovered a judgment in varying amounts of actual damages in a prior case. The reference in Scanwell's brief to "apportionment" at page 704 of the opinion in *Haynes* appears to be to the various judgments entered against the defendants in favor of the plaintiffs. It is obvious that the jury did not "apportion" the actual damages between the defendants, but awarded each plaintiff as actual damages the amount of the prior judgment in the personal injury case. *See id*. at 704.

A case that actually deals with the "apportionment" issue in a civil conspiracy context is *Mills v. Murray*, *supra*. In *Mills* the defendants were found liable for conspiring to breach the restrictive covenants in another defendant's employment agreement. The jury awarded compensatory damages against defendant Murray of $2,594; compensatory damages against his new employer Professional Consulting Services, Inc. of $2,594; and compensatory damages against defendant Rudolph of $1.00. *See id*. at 14. The court rejected the jury's award as "palpably improper. The establishment of the conspiracy made all three defendants, severally and jointly, equally liable as joint tortfeasors and the judgment for all damage resulting from the conspiracy *must be in one amount and against all who were not discharged*." *Id*.

Thus, even if the judgment were otherwise affirmed on liability, the damages awarded were incorrect as a matter of law. Dimerco would be liable, jointly and severally, for the damages assessed as a result of Chan's conduct, or for no more than $54,000.

IV.

The Trial Court Erred In Denying Appellants' Motion For Mistrial And Motion For New Trial Because Appellants Were Unfairly Prejudiced By The Misconduct Of Respondents' Counsel When He Invited The Jury To Infer From Appellants' Choice Of Counsel That Appellants "Knew They Had Done Something Wrong," In That A Jury May Not Draw Any Adverse Inference From The Defendants' Choice Of Lawyers, The Remark Was An Appeal To The Jury's Prejudices On A "Rich Man/Poor Man" Basis, And Dimerco Knew Of The Document Which Supposedly Led To The Hiring Of New Counsel More Than A Year Before New Counsel Were Hired, And Thus There Was No Evidentiary Basis For The Inference Respondent Asked The Jury To Draw.

In Point IV Appellants complained of counsel's statement during closing argument that defendants hired "two law firms that have a combined twelve hundred lawyers. . . . Now, ladies and gentlemen, there's only one of two conclusions. Either I'm really, really, really that good of a lawyer or they did something wrong. And, you know, my wife says I'm a pretty good lawyer, but I'm not that good." T. 1821-1822. After defendants' objections and motion for a mistrial were overruled, counsel told the jury: "They didn't like that." T. 1823.

Scanwell explained that its counsel intended to argue that the circumstances surrounding the belated production of a damaging document suggested consciousness of Dimerco's alleged wrongdoing. Resp. Br. at 36. If counsel had confined his argument to that point, then this issue wouldn't have arisen. But he didn't. Appellants' objection was to counsel's argument that the hiring of two large law firms was proof of defendants' wrongdoing, as if *prima facie* the hiring of large law firms proved something about a party's liability.

Scanwell seeks refuge in the general principle that the trial court is in the best position to assess the effect of improper argument on the jury, rather than even attempt an explanation of why the size of defendant's law firm is relevant. Scanwell also says that there was no need for it, a large company in its own right, to make the "rich man, poor man" argument. Resp. Br. at 36. Whether Scanwell is richer or poorer than Dimerco and Chan is not the point. The error was the trial court's failure to remedy the improper argument that the hiring of counsel, in particular counsel from a large firm, is entitled to consideration as proof that a defendant is liable. The hiring of a lawyer, the size of the defendant's law firm or the prominence of his counsel is irrelevant to its liability. A party can hire any lawyer it wants. The notion that only "guilty" parties hire big law firms, while "innocent" parties hire small law firms is repugnant and insulting.

Such argument is fortunately rare, but it partakes of the same vices of the "rich man, poor man" argument, as well as an argument suggesting that lawyers were hired to concoct a defense, that were condemned in *Green v. Ralston Purina Co.*, 376 S.W.2d 119 (Mo. 1964) and *Yingling v. Hartwig*, 925 S.W.2d 952 (Mo. App., W.D. 1996).

V.

The Trial Court Erred In Submitting Instruction Nos. 7 And 12 (The Verdict Directors) Because They Constituted "Roving Commissions" In That The Instructions Failed To Require The Jury To Find Facts That Would, If Believed, Constitute A Breach Of Fiduciary Duty In That They Allowed The Jury To Find Defendants Liable If They Concluded That Chan Helped Dimerco "Take Over" Scanwell's Business Operations, "Including" Obtaining The Office Lease And Disclosing Confidential Information, Thus Inviting The Jury To Find Liability For Other Actions Not Specified In The Verdict Directors.

Scanwell defends the use of the word "including" in Instruction No. 7 on the grounds that it is ordinarily a word of limitation, and the jury would have understood that it did not authorize them to go beyond the claims relating to the lease and disclosure of alleged confidential information to find a basis for liability against Chan. Resp. Br. at 40. But in *St. Louis County v. State Highway Commission*, 409 S.W.2d 149 (Mo. 1966) this Court reached exactly the opposite conclusion, saying: "Ordinarily ["include"] is not a word of limitation, but rather of enlargement. . . . When used in connection with a number of specified objects it implies that there may be others which are not mentioned." *Id*. at 153 (citations omitted).

Appellants cited and discussed the *St. Louis County* case in their Opening Brief, *See* App. Br. at 62, Scanwell didn't even mention it, let alone try to distinguish it. Its response was to point to the use of the phrase "including, but not limited to" in contracts and municipal ordinances and to ask why the additional phrase would be necessary.

There are several answers to that question, the most obvious being that the phrase "but not limited to" is redundant and not necessary at all. It wouldn't be the first time that lawyers string together words that add nothing to the meaning sought to be conveyed. *See, e.g.* Bryan A. Garner, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002) at 196. (Why, for example do lawyers say "cease and desist," "indemnify and hold harmless," "null and void" when the extra words add nothing to the meaning? Habit, tradition or an attempt to sound lawyerly perhaps, but needless if one is trying to be "precise, specific and definite." *See id.*)

To the extent the use of the tag phrase "but not limited to" appears after the word "including" in contracts and ordinances, it probably results from an attempt to make clear that the principle involved applies to similar unanticipated events. It *might* be justifiable in those contexts (although Garner would say it isn't), but we are dealing here with instructions that a jury is supposed to use to determine a party's liability. The theory behind MAI is to tell the jury what ultimate facts it must find to hold a party liable. *See* "Why And How To Instruct A Jury," MISSOURI APPROVED INSTRUCTIONS (6th ed. 2002) at LXII-LXXV. Jury instructions aren't intended to cover unanticipated events — they are intended to direct the jury to consider specific issues based on the evidence at trial.

Scanwell says that Instruction No. 7 was similar "in structure" to the instruction approved in *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458 (Mo. banc 1998). That isn't true. The controversy in *Seitz* centered on whether, in a bailment case, it was proper to instruct the jury to decide whether the defendant kept the property "in a safe place." *See id*. at 462-465.

Scanwell's actions belie its claim that the word "including" was supposed to convey to the jury the notion that it should consider only the questions of the lease and the disclosure of alleged confidential information. Scanwell asked the trial court to submit the solicitation of customers and employees as part of the verdict directors, but the court refused. *See* Instruction Nos. 7A and 12A, L.F. 71, 83. Yet, Scanwell continues to argue in this Court that Chan's contacts with customers and employees was improper solicitation constituting a breach of fiduciary duty. If that conduct wasn't intended by Scanwell to be covered by Instructions Nos. 7 and 12 so that the jury could rely upon it in returning a verdict against defendants, why is Scanwell contending those actions justify a denial of a motion for judgment notwithstanding the verdict because they supposedly show a breach of fiduciary duty?

Here, the jury was invited by the instruction to consider not just the claims relating to the lease and alleged confidential information, but anything else they might believe constituted an attempt to "take over" Scanwell's business. Under these instructions the jury could have found that Chan did not solicit any of Scanwell's customers for Dimerco until after she left, or that Chan did not ask any of the St. Louis employees to join her until after Scanwell sent the layoff letter — both proper under the law— but still conclude that such protected conduct was part of "taking over" Scanwell's business. That makes Instructions Nos. 7 and 12 roving commissions.

VI.

The Trial Court Erred In Submitting Instruction No. 9 Defining "Fiduciary Duty" Because The Instruction Misstated Missouri Law By Stating That A Fiduciary Duty Between An Employer And Employee Arises When The Employer Merely "Reposes Trust And Confidence In Another" In That No Such Fiduciary Duty Exists Unless The Person Alleged To Have Breached The Duty Gains Superiority And Influence Over The Other.

Appellants believe that Chan's relationship with Scanwell was that of an employee, not a fiduciary. Certainly, she was not a corporate officer and therefore did not stand in a fiduciary relationship to the company as a matter of law. But if she is to be held liable as a fiduciary, then she was entitled to have the jury properly instructed as to when an employee becomes a fiduciary for her employer. Instruction No. 9, saying only that: "A fiduciary relationship is established when one reposes trust and confidence in another in the handling of certain business affairs," L.F. 51, isn't correct.

When one seeks to prove the existence of a fiduciary relationship that isn't created by operation of law (such as a trustee-beneficiary or attorney-client relationship), the party must show the following basic elements:

> (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental stability or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or

habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places trust and confidence in the dominant party.

Emerick v. Mutual Benefit Life Ins. Co., 756 S.W.2d 513, 526-527 (Mo. banc 1988).

The question here is what type of "trust and confidence" Scanwell must have been placed in Chan to make her a fiduciary. The Court has said that for a fiduciary relationship to exist " 'there must be evidence of a special trust with respect to property or business.' " *Wilhoit v. Fite*, 341 S.W.2d 806, 814 (Mo. 1961), *quoting Hedrick v. Hedrick*, 350 Mo. 716, 726, 168 S.W.2d 69, 74 (1943).

Scanwell complains that this definition "would preclude any verdict for a corporate employer for breach of fiduciary duty by an employee because an employee rarely gains superiority and influence over the corporation that employs her. Any corporate employee who had a superior to report to, such as Chan, would by definition not have gained superiority over her employer because she answered to a superior corporate officer. Indeed, only chief executive officers, having no superior officer to report to, would owe fiduciary duties to their corporate employers under Appellants' definition." Resp. Br. at 43.

Yes. That is exactly the point. It is very rare that an employee who is neither an officer nor director of the company gains such control over its affairs. And that is why Instruction No. 9 is wrong because it would hold anyone the company merely "trusted" to a fiduciary duty. Presumably, most companies trust their employees. That doesn't make all employees fiduciaries. Only those in whom the company has reposed special trust and

confidence — something far beyond the ordinary, to the point where the company virtually surrenders control of its affairs to the employee — become fiduciaries.

Instruction No. 9 did not correctly state the law and the jury was misled as to the nature of the claim against Chan.

VII.

The Trial Court Erred In Denying Dimerco's Motion For Judgment Notwithstanding The Verdict Because Scanwell Failed To Make A Submissible Case Of Conspiracy Against Dimerco In That It Failed To Present Any Evidence Of A Conspiracy Concerning The Lease, Inasmuch As It Was Undisputed That Anthony Tien, Who Signed The Lease On Behalf Of Dimerco, Was Unaware That He Was Leasing The Same Space Previously Occupied By Scanwell, And It Was Undisputed That Kurt Brydenthal, Who Authorized Ms. Chan To Obtain A Lease For Scanwell, Did Not Do So Until After Learning That Scanwell Had Failed To Renew Its Lease.

Scanwell's perfunctory response to Point VI hardly deserves a reply. We point out only that a conspiracy must have an unlawful objective. *Gettings v. Farr*, 41 S.W.3d 539, 542 (Mo. App., E.D. 2001). It isn't unlawful to compete with another company for the same customers. *Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d 742, 747 (Mo. App., E.D. 1993). It isn't unlawful for an at-will employee to make plans compete with her existing employer, or even to do so secretly. *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 26-27 (Mo. banc 1966). It isn't unlawful to ask a company's at-will employees to leave their existing employer to join a competing company. *Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 351 (Mo. App., E.D. 2000). It isn't unlawful to

sign a lease for space, *Trieman*, 409 S.W.2d at 26, especially when the current tenant has failed to exercise its option to renew. It isn't unlawful to look at another company's office. It isn't unlawful to tell customers that one is going to work for another company so long as the employee doesn't solicit the customer for the new employer. *Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d at 747.

In short, there was no evidence that anything Chan did was unlawful, and therefore Dimerco could not be liable for her actions under a civil conspiracy theory.

CONCLUSION

For the foregoing reasons, Appellants Stevie Chan and Dimerco Express (U.S.A.) Corp. respectfully request that this Court grant judgment in their favor notwithstanding the verdicts, grant a new trial, or, in the alternative, grant a remittitur on the verdict against Dimerco to reduce the verdict to no more than $54,000, and to grant such other relief as the Court deems proper in the circumstances.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 6,598 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief and one, virus-free diskette, containing an electronic copy of the brief, was mailed first class, postage prepaid, this ___ day of October, 2004 to:

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